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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 491

LEE FONG FOOK, PETITIONER

v.

I. F. WIXON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, PORT OF SAN FRANCISCO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (R. 50–52) is reported at 170 F. 2d 245. The opinion of the District Court (R. 26–35) is reported at 74 F. Supp. 68.

JURISDICTION

The judgment of the Court of Appeals was entered October 25, 1948 (R. 53), and a petition for rehearing was denied November 26, 1948 (R. 54). The petition for a writ of certiorari was filed December 31, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The principal question involved is whether judicial consideration of petitioner's application for a writ of habeas corpus should be deferred until final administrative determination of the exclusion proceedings in which petitioner has appealed from a finding by a board of special inquiry that he is an alien ineligible for admission to the United States.

STATUTE INVOLVED

Sections 16 and 17 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 885, 887, as amended, 8 U. S. C. 152, 153, provides in pertinent part as follows:

> SEC. 16. * * * Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. * * *
>
> SEC. 17. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before such boards shall be separate and apart from the public, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Attorney General. * * * In every case where an alien is excluded from admission into the United

States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General. * * *

STATEMENT

In a petition for a writ of habeas corpus filed on petitioner's behalf in the District Court for the Northern District of California on December 8, 1947, it was alleged that petitioner was born in San Francisco, California, and is therefore a citizen of the United States; that his native birth had been attested by a decree of a California State court on August 14, 1944, in a proceeding brought under provisions of California law;[1]

[1] This decree had been procured pursuant to Sections 10600 *et seq.* of the Health and Safety Code of California (Deering's *California Codes, Health and Safety*), which provide, in relation to births occurring in California at a time when registration was not required by law, as follows:

"§ 10600. * * * any person beneficially interested in establishing of record the fact of and the time and place of, such birth * * * may file with the county clerk a verified petition for an order judicially establishing the fact of, and the time and place of the birth * * * in either of the following courts.

"(1) The superior court of the county in which the birth * * * is alleged to have occurred.

"(2) The superior court of the county in which the person whose birth * * * it is sought to establish is residing; * * *

"§ 10602. At least five day before the date of the hearing, a copy of the petition shall be served upon the district attorney of the county in which the petition is filed, * * *

that he is an honorably discharged veteran of the Army of the United States (see R. 43–44);[2] that he resided in the United States continuously from the time of his birth until January 1947, when he left for a visit to China, returning in August 1947; and that he was denied admission after hearings before a board of special inquiry on the ground that he is not a citizen. The petition asserted that the decree of the California State court is binding and conclusive upon the Immigration and Naturalization Service and that petitioner is therefore entitled to be released from their custody. (R. 2–18.)

A writ of habeas corpus issued (R. 20–21) and respondent filed a return alleging, *inter alia,* that petitioner had indicated his intention to appeal to the Commissioner of Immigration and Naturalization from the order of exclusion made by

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and he may appear at the hearing and oppose the making of the order.

"§ 10605. If, upon the hearing, the allegations of the petition are established to the satisfaction of the court, the court may make an order determining that the birth, * * * did in fact occur at the time and place shown by the proofs adduced at the hearing."

A certified copy of the decree of the California court in petitioner's case and a delayed birth certificate issued pursuant to the decree were introduced at the hearing in the district court (R. 41, 42).

[2] Petitioner's certificate of honorable discharge shows that he was in the service for about four months from September 23, 1942, to February 10, 1943, and that he was discharged under the provisions of Section VIII, Army Regulations 615–360 (R. 43–44).

the board of special inquiry and attaching the record of the board (R. 21–22). After the filing of a traverse, in which it was admitted that petitioner intended to take such an appeal (R. 23–26), and a hearing before the district court, the court on January 26, 1948, filed an opinion and order reciting that the board of special inquiry had denied petitioner admission on the ground that he was an alien not eligible for admission, that petitioner was represented by counsel of his own choosing at the several hearings held before the board, that petitioner had entered an appeal to the Commissioner, and that pending such appeal he filed his petition for a writ of habeas corpus. The court rejected petitioner's contention that the decree of the California court is binding under the full faith and credit clause of the Constitution (Art. IV, sec. 1) as extended by statute (28 U. S. C. (1946 ed.) 687, now 28 U. S. C. 1738), and held that the board of special inquiry had authority to determine whether petitioner was eligible for admission and that he was not entitled to a judicial determination of that question. The court also rejected as premature, because the administrative proceeding had not been completed, petitioner's claims that he was denied due process in the hearings before the board. In response to the claim in the petition for a writ of habeas corpus that petitioner was unable because of his confinement to obtain witnesses on his behalf and the prayer for release on bail

pending final determination of his case, the court adverted to petitioner's previous long residence in the United States and concluded both that petitioner should be released temporarily to afford him an opportunity to obtain witnesses to prove, if he could, that he is a citizen, and that the court had authority under the general habeas corpus statute, 28 U. S. C. (1946 ed.) 461, now 28 U. S. C. 2243, to order such release for that purpose. Unconditional release was accordingly refused, but the court continued the matter for determination of the terms and conditions of petitioner's temporary release. (R. 26–35.) However, in its order filed February 6, 1948, the court denied the petition for habeas corpus and remanded petitioner to the custody of respondent, "except that he may be conditionally and temporarily released only, upon posting bond in the sum of One thousand ($1,000) Dollars" (R. 36).

On appeal, the court below declined to consider the merits of petitioner's claim that he is entitled as of right to be released because he is a citizen, pointing out that the administrative determination might ultimately be favorable to him, thus obviating any necessity for recourse to the courts. The court said that the action of the district court in releasing petitioner temporarily on bail to enable him more effectively to pursue his administrative remedy was correct, but held that the district court was wrong in denying the petition for habeas corpus. Accord-

ingly, the cause was remanded to the district court with directions to vacate the order of denial and to continue the cause until final determination of the administrative proceedings. (R. 50–53.)

ARGUMENT

It is indisputable that an exclusion decision of a board of special inquiry is, in the language of the applicable statute, "final, unless reversed on appeal to the Attorney General." 8 U. S. C. 153, *supra*, pp. 2–3. Except for changes not here important, relating to the administrative procedure, this provision has remained constant in all enactments of the immigration laws since 1891. Despite a multitude of challenges, the cases uniformly hold that a claim of American citizenship advanced by one applying for admission does not entitle him to a judicial trial in habeas corpus of the validity of his claim.[3] The right of such a person extends no further than the right to a fair hearing by the administrative agency entrusted with the enforcement of the immigration laws. *Quon Quon Poy* v. *Johnson*, 273 U. S. 352; *Ng Fung Ho* v. *White*, 259 U. S. 276, 282; *Kwock Jan Fat* v. *White*, 253 U. S. 454; *Tang Tun* v. *Edsell*, 223 U. S. 673; *Chin Yow* v. *United States*, 208 U. S. 8, 13; *United States* v. *Ju Toy*,

[3] See, however, Sec. 503 of the Nationality Act of October 14, 1940, 54 Stat. 1171, 8 U. S. C. 903.

198 U. S. 253; *United States ex rel. Medeiros* v. *Watkins*, 166 F. 2d 897 (C. A. 2).[4]

Thus, in the leading case of *United States* v. *Ju Toy, supra*, this Court said (198 U. S. at 262–263):

> It is established, as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed—as well when it is citizenship as when it is domicil * * *. If, for the

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[4] This is not the rule applicable to all cases coming within the scope of the immigration laws. In deportation proceedings, as distinguished from exclusion proceedings, the subject of deportation is generally said to have a right to a judicial trial *de novo* of any substantial claim of American citizenship. *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149; *Ng Fung Ho* v. *White*, 259 U. S. 276.

In *Carmichael* v. *Delaney*, 170 F. 2d 239 (C. A. 9), to which the court below adverted in its opinion in the present case (R. 52), that court held, on the authority of *Delgadillo* v. *Carmichael*, 332 U. S. 388, that a long-time resident who served in the United States Maritime Service during the war did not make an entry upon his return from service and that therefore the board of special inquiry, whose decision excluding him was affirmed by the Board of Immigration Appeals, had no authority to order his exclusion. In a novel dictum, the court also said that in view of the special circumstances of that case, i. e., Delaney's long residence in the United States, his enlistment in the merchant marine, and his return to resume his residence, he was entitled, as in the case of a deportee, to a judicial trial *de novo* of his claim that he was a native born citizen. In the instant case the court below said that "On the facts here appearing the petitioner is entitled to urge that he occupies the status of a resident" (R. 52). But the court nevertheless required him to exhaust the administrative process before invoking the judicial process.

> purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial.

Petitioner argues, however, that the "sole issue" presented by his petition for a writ of habeas corpus is "whether the Immigration and Naturalization Service has authority to subject to collateral attack in an administrative proceeding an admittedly authentic final judgment of the California Superior Court establishing the fact of [petitioner's] birth in California and *ipso facto,* by operation of the 14th amendment, his national citizenship * * *" (Pet. 6). Accepting petitioner's reliance on this as his sole argument, we think he must fail for several reasons.

Although we believe, as we have pointed out above, that petitioner is not entitled in this proceeding to a judicial trial of the issue of his citizenship, if we are in error in that regard, nevertheless we agree with the court below that an examination of the merits of the petition for writ of habeas corpus should be deferred until final decision of petitioner's administrative appeal from the decision of the board of special inquiry.

It has long been the rule in regard to exclusion proceedings that even within the limited permissible scope of review on habeas corpus, a per-

son excluded must first exhaust his administrative remedies before seeking court review. In *United States* v. *Sing Tuck,* 194 U. S. 161, 168, this Court held that:

> "* * * it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way.",

and at page 170 also said:

> "* * * before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with."

The *Sing Tuck* decision was cited with approval in *Tutun* v. *United States,* 270 U. S. 568, 576–577, for the proposition that:

> [The United States] may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted.[5]

Petitioner has not exhausted the administrative remedies provided by the statute and the

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[5] The doctrine of exhaustion of administrative remedies before resort to the judicial process is a familiar principle of case law relating to administrative agencies of the Government. *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802; *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. The same principle has been affirmatively stated in the Administrative Procedure Act. 5 U. S. C. 1009 (c). See also *Attorney General's Manual on the Administrative Procedure Act* (1947), p. 103.

regulations of the Immigration and Naturalization Service. Although he noted an appeal to the Commissioner, he did not pursue it, but instead filed his petition for a writ of habeas corpus in the district court. The regulations referred to provide for an appeal as of right, not only to the Commissioner (8 C. F. R., Supp. 1947, Part 136), but also, in the event his decision is adverse, to the Board of Immigration Appeals (8 C. F. R., Supp. 1947, Part 90). In addition, the regulations provide for the reopening and reconsideration of cases of exclusion upon the presentation of new or additional evidence. In these circumstances, petitioner's resort to the courts is obviously premature. As the court below said in this regard (R. 52):

> Perhaps the appellate body within the Department, with the aid of such additional evidence as petitioner may be able to present, will reach a conclusion on the facts favorable to the petitioner, in which event no further recourse to the courts would be necessary. If its decision is unfavorable the court will at least have the benefit of the final views of the Department on the effect of the evidentiary showing.[6]

[6] We are advised that petitioner's appeal to the Commissioner has been held in abeyance because of the intervening filing of the petition for habeas corpus. This is in accordance with the established policy of the Service to suspend further administrative proceedings whenever the party af-

Petitioner contends, however, that he need not exhaust his administrative remedies because no issues of fact are involved, but only a question of law, i. e., the effect of the decree of the California state court that petitioner was born in San Francisco. If we accept his contention as to the necessity of exhausting the administrative remedies, so that habeas corpus would be a proper means of reviewing administrative proceedings at an intermediate stage when only a question of law is raised, still we believe petitioner's case falls short on his own hypothesis.

The ultimate question at issue here relates solely to the place of petitioner's birth, whether in the United States or without. That is not a question of law. It is a question of fact, the consideration and determination of which is properly and exclusively within the authority of the administrative agencies provided in 8 U. S. C. 152, 153, as implemented by the provisions for appeal in 8 C. F. R., Supp. 1947, Parts 90, 136. See cases cited at pp. 7–8, *supra,* especially *United States* v. *Ju Toy.*

But petitioner argues that his case does not fall within that rule because the evidence of citizenship which he advanced should have been given, as a matter of law, conclusive effect. That evidence was a delayed birth certificate issued to petitioner in 1944 pursuant to the decree of a

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fected has instituted a judicial proceeding. Thus, petitioner's appeal is still pending.

California state court finding petitioner to have been born in San Francisco. By arguing that such a decree is binding upon the federal courts and agencies in all future actions or proceedings, petitioner seeks to change the central issue from one of fact to one of law and thereby justify his otherwise premature petition for a writ of habeas corpus. In view of our belief that the decree in question is manifestly not binding upon the federal government, its agencies or its court (see pp. 13–15, *infra*), we submit that the question of the place of birth of petitioner is solely a question of fact. To hold otherwise would be an invitation to all persons against whom a preliminary adverse administrative agency ruling had been made, to assert an obviously insubstantial error of law in order to justify an early judicial review that would disrupt the "orderly" administrative handling of the matter.

Conceding, for the purpose of argument only, that petitioner has raised, in his petition for a writ of habeas corpus, an issue of law as to which he is entitled to judicial review at the present stage of the administrative process, we nevertheless urge that such issue must be decided against him.

Petitioner contends that under the full faith and credit clause of the Constitution (Art. IV, sec. 1), as extended by statute to the federal courts (28 U. S. C. (1946 ed.) 687, now 28 U. S. C. 1738), "federal agencies and courts are bound by

California law" as to the determination of United States citizenship, and that it was beyond the authority of the board of special inquiry to go behind the decree of the California court (Pet. 20–28). We believe that the fallacy of this position was effectively exposed in the opinion of the district court (R. 30–31):

> Neither reason nor authority support this contention.
>
> The proceeding authorized by California state law for the establishment of the fact of birth is not an adversary proceeding, save and except that the statute requires that notice of the hearing be given to the District Attorney of the county wherein the hearing is had. The United States not being a party to such proceeding, nor having consented thereto, is not bound by the state court adjudication. Particularly is this so as to the administration of laws of the United States, which it alone enforces (Const. Art. I, Sec. 9, Clause 1.) If the California Court had granted petitioner a decree of naturalization, pursuant to its authority so to do expressly granted by Congress (54 Stat. 1140; 8 USC 701), then of course such a decree would be fully binding on the United States and could only be attacked in the manner provided by Federal Statute (8 USC 738). But jurisdiction to adjudicate the citizenship status of a United States resident has never been conferred by Congress on state courts. Consequently, any state court judgment purporting to exer-

cise that jurisdiction cannot, to that extent, claim of the Federal Courts full faith and credit.

The state court decree establishing birth is no more conclusive upon the United States as to citizenship or as to the right of entry into the United States than would be the finding of a state court in a proceeding between private litigants wherein it might be necessary or proper in deciding property or personal rights to find the date or place of birth of one of the litigants before the court. In my opinion the decree of the state court is evidence of petitioner's birthplace but not conclusive proof of his citizenship. The United States has the full right to inquire into the facts upon which American citizenship is claimed, when entry into the United States is sought; and the burden of proving that citizenship is upon the person seeking entry. If this were not so, the doors would be wide open to fraud upon the part of entrants in the claim of citizenship or fraud in obtaining state decrees as to birth. *Lee Leong* v. *U. S.*, 217 Fed. 48; *Ex Parte Lee*, 49 Fed. 2d 468.[7]

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[7] The trial judge said in a footnote at this point (R. 31):

"The record here shows that the sole witness for the petitioner in the state court proceedings to establish birth, then testified to having seen petitioner immediately after he was born in San Francisco in 1901. This same witness later testified before the Immigration Authorities that he saw petitioner for the first time in 1911 or 1912 when the latter was about three or four years old."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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